No. 796.

IN THE

Supreme Court of the United States

October Term, 1967.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, AFL-CIO, AND ITS LOCAL 22,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Brief for Respondents

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TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CONTENTS

COUNTER-STATEMENT OF THE CASE.

Early in 1964, Edwin D. Holder, who was a member of the Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO, and of its Local No. 22,[1] lodged with that Local Union a complaint or charge accusing the Local's president of a violation of the parent union's constitution. After holding a hearing on this complaint, Local 22 decided that its president was not guilty of the alleged violation (R. 5; 16-17).

The parent union's constitution provides that in such an intra-union proceeding, the accusing member may appeal from an adverse decision (R. 6) and also provides that a member aggrieved by an action of a local union must first "exhaust all remedies and appeals within the Union, provided by this Constitution," before seeking relief in "any court or other tribunal outside of the Union" (R. 6).

Holder ignored these provisions. Shortly after the Local's decision exculpating its president, he immediately filed with the National Labor Relations Board an unfair labor practice charge (hereinafter sometimes referred to as the "previous charge") based on the same facts as had been the basis of the complaint he had previously filed with the Local (R. 5). The Regional Director for the Board's Second Region also dismissed Holder's unfair labor practice charge. Thereafter a complaint was filed with Local 22 against Holder, accusing him of violating the provisions of the International's constitution requiring that members exhaust internal remedies prior to seeking extra-union relief. This intra-union complaint resulted in Hold-

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[1] Hereinafter we sometimes refer to the parent union as the "International" and to both it and Local 22 as the "Respondents".

er's expulsion from Respondents and Holder then filed the unfair labor practice charge which gave rise to the instant proceeding.

The Board found that, by expelling Holder, Respondents committed the unfair labor practice defined in Section 8(b)(1)(A) of the Act and issued a broad remedial order. The United States Court of Appeals for the Third Circuit, in an opinion by Judge Hastie (R. 33 et seq.), denied enforcement of the Board's order and set that order aside (R. 41). On January 15, 1968, this Court granted the Board's petition for a writ of certiorari (R. 42).

The Statement of the Case contained in the Board's brief before this Court adequately summarizes the foregoing facts. That Statement also, at its very outset, describes Holder, at the time the operative facts occurred, as an employee of the United States Lines Company. By opening its Statement with this fact, the Board obviously seeks to focus this Court's attention upon it. But an understanding of the issues raised in this appeal requires that we here emphasize that Holder's relationship with United States Lines was not at all affected by termination of his membership in the Respondents. More particularly, Holder's expulsion from Respondents did not in any wise affect his status as an employee of United States Lines. Respondents interfered with none of his job rights. The fact that Holder happened to be employed by the United States Lines Company at the time Respondents expelled him has about as much significance, in the context of what actually occurred to Holder, as would be the fact that Holder happened to be a member of the Masons, the Elks, or NAACP.

Another instance in which the Board's Statement of the Case may lead to a wrong impression is the statement at page 3 summarizing the formal allegation made by Holder in the unfair labor practice charge, the filing of which led to his expulsion. That summary includes a quotation of

the formalistic language of the charge, namely, that the Local had caused "U. S. Lines to discriminate against him because he had engaged in certain protected activity with respect to his employment." This may obscure the relevant and important fact that the nature of the accusation contained in this charge had nothing to do with the reason for Holder's expulsion from the Respondents.[2] Both the Trial Examiner and the Board found that Respondents' reason or motive for expelling Holder from membership was solely that "Holder had filed unfair labor practice charges with the Board without first exhausting his internal union remedies" (R. 22, 24). It is thus clear that the Board's own finding is that it was the fact that Holder filed the previous charge, rather than the contents of that charge, that caused Respondents to expel him from membership.

Most simply stated the facts in this case are as follows:

Solely because Holder violated an internal union rule requiring a member to exhaust intra-union remedies prior to seeking Board or court relief, Respondents expelled Holder from membership without affecting his employment status.

On the basis of these facts, the Board would convict Respondents of an unfair labor practice.

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[2] It may not be amiss, however, to note also that the Regional Director dismissed this charge because of lack of evidentiary support therefor, as noted in footnote 3 of the Board's brief. We have been unable to find anywhere in the record support for the statement in that footnote that Holder's charges were predicated on the allegations that the alleged discrimination against him was "because of his intra-union opposition to the president of Local 22, and that Local 22 had thereafter unlawfully refused to process his grievance relating to the demotion."

SUMMARY OF ARGUMENT.

(1) Holder was expelled from Respondents for violating a provision of Respondents' constitution requiring that members exhaust intra-union remedies prior to seeking extra-union relief. His employment status was not affected by this expulsion. A provision in a union's constitution and bylaws requiring exhaustion of internal union remedies clearly constitutes an internal union rule governing what a member may or may not do as a condition of retaining his membership. Accordingly, and pursuant to the plain meaning, the clear legislative history, and the governing case authority, the lower Court correctly concluded that Holder's expulsion by Respondents was not an unfair labor practice under Section 8(b)(1)(A) of the Act. This Court's decision in *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U. S. 175 (1967), permits of no other result.

(2) Even assuming that by expelling a member without affecting his status as an employee a union could violate Section 8(b)(1)(A) of the Act, no such violation can be found on the basis of the instant record, since there is no evidence that Holder's expulsion interfered with his engaging in activity of the kind protected by Section 7 of the Act. To the contrary, Holder's expulsion came about solely because of his violation of that provision of Respondents' constitution requiring that members exhaust internal remedies prior to seeking court or agency relief. By merely filing an unfair labor practice charge, in violation of that rule, a member is not, *per se*, engaging in protected, concerted activity.

(3) Until the Board's 1964 decision in *Operating Engi-*

neers Union (Charles S. Skura), 148 NLRB 679, no case had held, and no one had suggested, that a union could violate Section 8(b)(1)(A) of the Act by expelling a member for violation of an internal union rule, where it does so without interfering with the member's status as an employee. It was in 1959, by means of Title I of the Labor-Management Reporting and Disclosure Act, 73 Stat. 522, 29 USC 411 et seq. (hereinafter referred to as the "Landrum-Griffin Act"), that Congress first turned its attention to the union-member relationship and first declared federal rights and remedies in respect thereof. Section 101(a)(4) of Title I of the Landrum-Griffin Act protects a member's "right to sue", viz., his right to institute court and Board actions against his union. Section 102 of Title I of the Act states that suits for infringement of Title I rights "shall be brought" in the U. S. district court for the district where the violation occurred. Accordingly, the only federal forum provided by law to redress the "wrong" of Holder's expulsion by the Respondents is a U. S. district court in an action brought under Title I of the Landrum-Griffin Act.

(4) Section 101(a)(4) of the Landrum-Griffin Act contains a proviso which states that union members "may be required to exhaust reasonable [intra-union] hearing procedures", for a period of time not to exceed four months, prior to instituting extra-union "proceedings against such organizations or any officer thereof". This provision of the Landrum-Griffin Act, as the Court below held, expressly sanctions that conduct of Respondents which the Board held was an unfair labor practice under Section 8(b)(1)(A) of the Act. But it can not be held that that which is expressly sanctioned by the Landrum-Griffin Act is an unfair labor practice under the Taft-Hartley Act, particularly in light of the legislative history of Section 8(b)(1)(A) and the proviso to that Section.

ARGUMENT.

Introductory.

Particularly because of the nature of the Board's brief, it is well to remember what this case does involve and what it does not involve. The narrow issue before the Court in this appeal is whether the Congress *in Section 8(b)(1)(A) of the Act* declared it to be an unfair labor practice for a union, without affecting the job rights of a member, to expel that member from membership for violating a union rule requiring that members exhaust internal union remedies prior to resorting to extra-union judicial *fora*. As Respondents view it, therefore, the legal issue involved in this case is relatively narrow. However, implicit in this issue is a somewhat broader question of administrative law and of jurisprudence generally. That question is this:

May the Board, in the guise of interpreting the Act, amend the Act so as to condemn as an unfair labor practice conduct which is not only not proscribed therein, but conduct which, all available evidence indicates, Congress specifically intended not to reach by Section 8(b)? In the first of the following sections, we shall demonstrate that, beyond any question, Congress never intended that conduct such as Holder's expulsion by Respondents in this case was to be considered an unfair labor practice.

I.

THE PLAIN MEANING AND CLEAR LEGISLATIVE HISTORY OF SECTION 8(b)(1)(A) OF THE ACT ESTABLISH THAT, SINCE HOLDER WAS EXPELLED FROM MEMBERSHIP IN RESPONDENTS FOR VIOLATION OF AN INTERNAL UNION RULE WITH RESPECT TO THE ACQUISITION OR RETENTION OF MEMBERSHIP IN RESPONDENTS, THE EXPULSION DID NOT VIOLATE THAT SECTION.

Section 7 of the Act preserves for employees the right "to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Further, Section 7 also guarantees to employees the right, with limitations not relevant here, "to refrain from any or all of such activities." Section 8(b)(1)(A) of the Act declares it to be an unfair labor practice for a union "to restrain or coerce, (A) employees in the exercise of the rights guaranteed in Section 7", with the following proviso:

> "*Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein."

The Board would have this Court hold Respondents guilty of a violation, as to Holder, of this Section.

At page 15 of its brief, the Board attempts to portray its theory of why in this case there was a violation of Section 8(b)(1)(A) as constituting no more than a traditional reading given to Section 8(b)(1)(A). But this is not true. Indeed, the extraordinary nature of what the Board attempted to do by its decision in this case is seen from the fact that that decision is the first in the history of the Na-

tional Labor Relations Act in which an order was entered by the Board directing a union to reinstate an expelled member. Indeed, it was not until the Board decided the case of *Operating Engineers Union (Charles S. Skura)*, 148 NLRB 679, on August 31, 1964—17 years after the enactment of Section 8(b)(1)(A) as part of the Taft-Hartley amendments—that anyone believed it conceivable that a union could violate the Act by expelling or otherwise disciplining a member, without in any way interfering with that member's status as an employee.[3] In *Skura*, the Board held that the union violated Section 8(b)(1)(A) when it fined an employee for filing unfair labor practice charges with the Board in violation of a rule requiring members to exhaust intra-union remedies prior to seeking extra-union relief. And the Board's decision in the instant case was based solely on its *Skura* reading of the Act.[4] But, as we shall now see, and as the Court below held, the construction given by the Board to Section 8(b)(1)(A) in *Skura* and in its few case progeny is violative of the plain language and clear legislative history of that Section.

The proviso to Section 8(b)(1)(A) states, in effect, that that Section cannot be violated by a labor organization when it prescribes and enforces internal rules governing the acquisition or retention of membership in the union. It is

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[3] On January 17, 1964—shortly before both the **Skura** decision and before Holder's expulsion on June 8, 1964—the Board decided the case of **Wisconsin Motor Corp.**, 145 NLRB 1097. The court below summarized **Wisconsin Motor** as follows: "... [T]he Board, after reviewing pertinent legislative history, had ruled that it had 'not been empowered by Congress to police a union decision, that a member is or is not in good standing or to pass judgment on the penalties a union may impose on a member so long as the penalty does not impair the member's status as an employee.' 145 NLRB at 1104."

[4] The Board's decision does not cite **Skura.** Rather, its brief decision relies on **Van Camp Sea Food Co., Inc.**, 159 NLRB No. 47. But **Van Camp Sea Food Co.** is based solely on the **Skura** interpretation of §8(b)(1)(A).

submitted that that consideration alone establishes the correctness of the lower court's decision holding that Respondents had not violated Section 8(b)(1)(A). On the basis of the proviso, and of the "plain meaning" rule of statutory construction, the Board's decision in this case—as well as in all its *Skura* line of cases—was clearly erroneous, since the exhaustion of remedies requirements in Respondents' internal rules is obviously one "with respect to the acquisition or retention of membership" in Respondents.

Moreover, a truly overwhelming body of recorded legislative history discloses that the "plain meaning" of the language of the proviso to Section 8(b)(1)(A) accurately and completely expresses the "true meaning" intended by the draftsmen to be given not only to that proviso but also to the portion of the section preceding it. It is unnecessary for us in this brief to discuss at any great length this legislative history. This is because only last term this Court, in *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U. S. 175 (1967), fully and completely assayed, in a context identical with that of the instant case, the legislative history of 8(b)(1)(A). In *Allis-Chalmers*, which we will discuss at greater length below, the union imposed fines upon some of its members for crossing its picket lines and working during an economic strike. Although the union there did not, just as the Respondents in this case did not, attempt to affect the job status of these employees, that union did institute, as to some of them, state court actions to compel payments of the fines. The employees filed charges under Section 8(b)(1)(A) and the Board, with this Court's subsequent approval, found that that Section had not been violated. Justice Brennan's opinion for this Court's majority in *Allis-Chalmers* is largely based on the consideration—which appears irrefutable to us—that in fining, and enforcing the fine against, a member for violating an intra-union rule, a union does not "restrain or coerce" that employee within

the meaning of Section 8(b)(1)(A), even aside from the exculpatory effect of the proviso in such a case. The chief basis for the Court's opinion is the legislative history to which we have referred above and which we need not repeat at any length here. That history, suffice it to say, establishes beyond the slightest possibility of doubt that, in enacting Section 8(b)(1)(A), all Congressmen, those for and against the Taft-Hartley amendments, intended that the Board should not interfere in any way with the internal affairs of labor unions. Although this Court is well aware of this legislative history, we can not refrain from noting here a small, but significant, item of it.

The proviso to Section 8(b)(1)(A) was introduced on the floor of the Senate by Senator Holland on April 30, 1947 (in the form of an amendment to an amendment offered by Senator Ball), for the purpose of putting to rest the strongly expressed fears by certain opponents of the Taft-Hartley amendments, that, by means of Section 8(b)(1)(A), limitations were being imposed on the rights of labor unions to conduct their own internal affairs. During discussion on the Holland amendment, one of these opponents, Senator Pepper, speaking for himself and Senator Morse, arose on the floor and questioned as follows:

> "Am I correct in assuming that it is the interpretation of the Senator from Ohio [Taft] and the Senator from Minnesota [Ball] that there is no provision of the bill which denies a labor union the right to prescribe the qualifications of its members, and that if the union wishes to discriminate in respect to membership there is no provision in the bill which denies it the privilege of doing so?" (93 Congressional Record 4400, Legislative History of the Labor Management Relations Act, Vol. II, p. 1142 (NLRB, 1948).)

Senator Ball's response to Senator Pepper's question is

an excellent summary of what the entire legislative history clearly discloses to have been the intent of the whole Senate. To Senator Pepper's question, Senator Ball responded as follows:

> "Absolutely not. If the union expels a member of the union *for any other reason* than nonpayment of dues, and there is a union-shop contract, the union cannot under that contract require the employer to discharge the man from his job. It can expel him from the union at any time it wishes to do so, *and for any reason.*" (93 Congressional Record 4400, Legislative History, Vol. II, p. 1142.) (Emphasis supplied.)

When this bit of legislative history is considered, together with the other items of that history discussed by this Court in *Allis-Chalmers*, it is obvious that the Board in this case did just what Senators Holland, Ball, Taft and others assured the opponents of the Taft-Hartley Act could never happen.

There is another significant item of legislative history which makes Respondents' position in this case as to the innocence of its conduct under Section 8(b)(1)(A) even stronger than that of the union in *Allis-Chalmers*. That item is as follows:

As finally enacted, the National Labor Relations Act of 1935 (the "Wagner Act") contained Section 8(a)(4), which makes it an unfair labor practice for an *employer* to discriminate against an employee for filing charges with the Board or for giving "testimony under this Act". Section 8(b), the Section which lists union unfair labor practices, and which was inserted into the Act as part of the 1947 amendments, contains no provision analogous to Section 8(a)(4)—a consideration which, in and of itself, goes a long way in establishing Respondents' innocence in this case. But what is particularly relevant in terms of legis-

lative history is the fact that, as it passed the House of Representatives, the Taft-Hartley Bill did contain a provision, a Section 8(c)(5), making it an unfair labor practice for a union to penalize members for instituting Board proceedings. (See Hartley Bill, H. R. 3020, 80th Cong., 1st Sess., *Legislative History, LMRDA*, Vol. I, p. 180.) However, this provision, which would have made it an unfair labor practice for a union to do what Respondents did here, was deleted from the Bill and the Act was passed without it. As the Court below stated (R. 37),

> "... it was not by inadvertence that Congress failed to include in the Taft-Hartley Act a general section explicitly protecting union members who filed charges against their unions from union reprisals."

It is noteworthy that, because there is no answer to the devastating effect of this portion of the legislative history on the Board's theory in this case, the Board offers none. What the Board does contend is, first, that this Court should be particularly attentive to the "overall plan" (Board's brief, p. 13) of the Congress, rather than to the actual language resulting from the legislative deliberations or to the legislative history indicating congressional intent. We welcome such an examination of this "overall plan" and shall direct our attention to it from page 19 to 23 below.

The Board also offers in support of its position as to legislative history, the view of the Court of Appeals for the District of Columbia, expressed in *Roberts v. NLRB*, 350 F. 2d 427, 428 (1967), that "the legislators *may* have decided it was unnecessary to make specific that it *might* be an unfair labor practice under Section 8(b)(1) to fine or discriminate against a member for filing a charge against the union" (emphasis supplied). But, this completely speculative remark by the Court in *Roberts* is rebutted not only by the *specific* legislative history adverted to above, but,

in addition, by this Court's authoritative gloss on this legislative history in the *Allis-Chalmers* opinion, which was decided subsequent to *Roberts*. There simply is no legislative history in support of the Board's position before this Court and, accordingly, the Board has been constrained to construct an interpretation of Section 8(b)(1)(A)—utterly baseless in our view—which we shall now discuss.

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer to "restrain or coerce" employees in the exercise of Section 7 rights. The Board argues that, since Section 8(a)(1) is violated, in addition to Section 8(a)(4), when an employer discriminates against an employee for filing unfair labor practice charges with the Board, a union must be deemed to violate Section 8(b)(1)(A) when it disciplines a member for filing charges against it. There are several answers to this contention, any one of which demolishes this interpretation of Section 8(b)(1)(A).

The Board's contention in this regard, which is found at pp. 11 to 14 of its brief, proceeds on the basis of the premise (Board's brief, p. 13) that Congress intended in Section 8(b)(1)(A) of the Act to impose upon unions the same restriction upon engaging in restraint or coercion as is imposed upon employers by Section 8(a)(1). Again, this Court's decision in *Allis-Chalmers* supplies the answer to this theory. At pages 190-191 of the majority opinion in *Allis-Chalmers*, Justice Brennan spoke as follows:

> "It is true that there are references in the Senate debate on Section 8(b)(1)(A) to an intent to impose the same prohibitions on unions that applied to employers as regards restraint and coercion of employees in their exercise of Section 7 rights. However apposite this parallel might be when applied to organizational tactics, it clearly is inapplicable to the relationship of a union member to his own union."

Even aside from the foregoing, the Board's contention as to the correlative nature of Sections 8(a)(1) and 8(b)(1)(A) ignores the fact that Section 8(b)(1)(A) has a proviso which immunizes from Board proscription internal rules of unions relating to the terms upon which members acquire and retain union membership. No analogue to this, of course, appears in Section 8(a)(1).

Moreover, the Board's theory in this regard is further rebutted by the fact that Congress specifically rejected the provision—Section 8(c)(5) of the Taft-Hartley Bill—which would have imposed upon unions an analogous duty not to commit that conduct by which an employer violates Section 8(a)(4) of the Act. Obviously, the specific rejection by Congress of an analogue to Section 8(a)(4) in Section 8(b) is entitled to more weight than an argument as to what Congress *may* have intended by the general language of Section 8(b)(1)(A)—even aside from the proviso and the legislative history.

The Board cites several cases in support of its theory of the interpretation to be given to Section 8(b)(1)(A). None of these cases, found at footnote 8 of the Board's brief, are on point. They are cases in which employers were held to have violated Section 8(a)(1) by threatening or penalizing, in various ways, employees who had invoked the Board's processes. From all that we have said above, it is obvious that these cases do not aid in answering the question of whether a *union* commits a violation of Section 8(b)(1)(A) when *it* disciplines a member for filing charges in violation of internal union rules.

Moreover, the facts of each of the cited cases demonstrate that, in light of those facts, the employer conduct at issue did in fact restrain employees in the exercise of Section 7 rights. These cases, therefore, may not be read to establish a *per se* rule that every Section 8(a)(4) violation by an employer necessarily entails a violation of Sec-

tion 8(a)(1). And the Board indirectly admits this. At page 12 of its brief, the Board states that "it has long been recognized that an employer's interference with an employee's resort to Board processes [a violation of Section 8(a)(4)] *may* also constitute a violation of" Section 8(a)(1). But all of the cases—and the only cases—cited by the Board were cases in which the employer's conduct clearly interfered with the employees' right under Section 7 to engage in concerted action—and was therefore directly and independently a violation of Section 8(a)(1)—as well as a punitive act forbidden by Section 8(a)(4). In this case, to the contrary (and still assuming *arguendo*, that some sort of equation can be posited between Sections 8(a)(1) and 8(b)(1)(A)), nothing in the record supports a finding that either Holder or any other member of the union was restrained or coerced from engaging in any type of concerted activity protected by Section 7 of the Act.

In sum, the Board cannot face up to the plain meaning and clear legislative history of Section 8(b)(1)(A). Accordingly, the Board eschews such considerations and proceeds on the basis of an utterly erroneous analysis of Section 8(b)(1)(A). Since the text and legislative history of Section 8(b)(1)(A) establish the innocence of Respondents' conduct as to Holder, the decision of the Court below should be affirmed.

II.

SINCE HOLDER'S EXPULSION FROM RESPONDENTS WAS NOT THE RESULT OF HIS ENGAGING IN ANY ACTIVITY PROTECTED BY SECTION 7 OF THE ACT, RESPONDENTS DID NOT VIOLATE SECTION 8(b)(1)(A).

The issue of whether Holder's filing of his previous charge was protected activity under Section 7 is one sug-

gested by the opinion of the court below in this case. It is an issue, however, which we do not deem to be particularly relevant to the questions presented herein. This is because we deem it obvious that Respondents' conduct, particularly because of the proviso to Section 8(b)(1)(A), must be deemed innocent in any event, that is, innocent even if it be assumed (i) that Holder's act of filing the previous charge was an activity protected by Section 7 of the Act, and (ii) that his expulsion constituted "restraint or coercion". Justice White, at pages 197-198 of his concurring opinion in *Allis-Chalmers*, addressed himself to this issue as follows:

> "... [A] union may expel to enforce its own internal rules, even though a particular rule limits the Section 7 rights of its members and even though expulsion to enforce it would be a clear and serious brand of 'coercion' imposed in derogation of those Section 7 rights. Such restraint and coercion Congress permitted by adding the proviso to Section 8(b)(1)(A)."

Since the opinion of the court below also held that "the proviso protects the Union's action in this case" (R. 38), we do not think it was necessary for that court to raise the issue of whether Holder's filing of his previous charge was protected activity in the context of this case. However, the court raised this question by also pronouncing a dictum to the effect that a union might violate Section 8(b)(1)(A) by disciplining a member who files charges asserting a violation by the union of his Section 7 rights.[5]

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[5] It must be noted that neither the Board's General Counsel nor the Board attempted to bring this case within this dictum of the court below. The General Counsel did not even attempt to prove—and the record is devoid of any facts showing—that Holder's previous charge was based on an allegation that the Respondents had interfered with any concerted activity on his part. To the contrary, the General Counsel proceeded solely on the **Skura** theory, namely,

The court below disposed of this question by finding authorization for Respondents' expulsion of Holder in the proviso of Section 101(a)(4) of the Landrum-Griffin Act. At pages 29 and 34 below, we shall demonstrate that this conclusion of the lower court was correct.

It is our position, however that even if there were no such proviso in Section 101(a)(4) of the Landrum-Griffin Act and even if the proviso in Section 8(b)(1)(A) of the Taft-Hartley Act did not exist, the Board's decision in this case, nevertheless, would have been erroneous. This is because it cannot be concluded that by the mere filing of an unfair labor practice charge an employee engages in an activity protected by Section 7 of the Taft-Hartley Act.

In the first place, Section 7 protects only "*concerted* activities for the purpose of collective bargaining or other mutual aid or protection". It is self-evident that the act of filing a charge, when taken by any individual solely on his own behalf, may not be deemed, in and of itself, to be a concerted activity protected by Section 7.

It is true that the act of filing an unfair labor practice charge may be an item of conduct which is taken as part of, or in furtherance of what could properly be called concerted activity—and therefore may itself be protected by Section 7. For examples of this, the Court may refer to the cases cited at footnote 8 of the Board's brief. But in those cases the General Counsel proved that the filing of

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that the expulsion of Holder for filing of charges with the Board—irrespective of the content of those charges—without first exhausting internal union remedies was, in and of itself, a violation of Section 8(b)(1)(A). Because of this position of the General Counsel, there was no hearing before a Trial Examiner in this case and the case was decided by the Board on the pleadings.

charges was in furtherance of other activity that was concerted. In the instant case, the General Counsel did not even attempt such proof.

Further, it would be totally unrealistic to hold that the filing of a charge must, *per se*, constitute concerted activity. This is because experience confirms that persons may and do file all sorts of unfounded charges with the Board, complaining of all sorts of employer and union conduct with which the Act is totally unconcerned. For instance, if a union member files an unfair labor practice charge against his union protesting that the union disciplined him for violating a union rule by smoking at a union meeting, would anyone believe that the filing of such a charge is conduct protected by Section 7? And yet, the General Counsel's theory of this case was not qualitatively different from the theory subsumed in this hypothetical case. In this case too, the General Counsel, with subsequent Board approval, was satisfied with a state of the pleadings in which the filing of charges, in and of itself, because of the *Skura* rule, was cited as protected activity. The General Counsel was totally unconcerned with developing a record on the question of what conduct by Respondents Holder complained of in his previous charge.

To the extent that there is "evidence" on this score in the record, it of course demonstrates that Holder was not disciplined for engaging in "protected activity". To the contrary, after careful investigation and consideration, the Regional Director for the Board's Second Region advised Holder that the evidence "does not tend to establish that the Union violated the Act by" any action ascribed to it in the previous charge and that, therefore, the Regional Director was "refusing to issue [a] complaint in this matter" (R. 31).

It is obvious from the foregoing that by merely filing charges with the Board Holder was not engaging in activity

protected by Section 7 of the Act and, in any event, that the record in this case demonstrates that Holder was not engaging in such protected activity by filing the previous charge. Accordingly, even aside from the provisos to Section 8(b)(1)(A) of the Act and Section 101(a)(4) of the Landrum-Griffin Act, in expelling Holder, the Respondents did not interfere with any of his Section 7 rights and therefore committed no violation of Section 8(b)(1)(A).

III.

THE FORUM PROVIDED BY LAW TO REDRESS ANY "WRONG" COMMITTED BY RESPONDENTS AS TO HOLDER IS A UNITED STATES DISTRICT COURT IN AN ACTION BROUGHT UNDER TITLE I OF THE LANDRUM-GRIFFIN ACT.

As we have noted above, the legislative history of Section 8(b)(1)(A) refutes completely the Board's holding that there was a violation of that Section in this case. Accordingly, the Board, in effect, asks this Court to ignore that legislative history and to focus, rather, on the "overall plan" of the Congress in "drafting labor legislation" (Board's brief, page 13). It is obvious that this Court should not simply ignore the legislative history to which we have adverted above, any more than it ignored that legislative history in the *Allis-Chalmers* case. However, we welcome, along with the Board, full consideration by this Court of the "overall plan" of labor legislation in relation to the instant context. That plan, to the extent it may presently be gleaned, supports only the conclusion that in this case Respondents have committed no unfair labor practice as to Holder, as we shall now demonstrate.

As we have seen, Holder's charge before the Board contained his complaint that he was expelled by Respondents

because he sought judicial relief outside the established intra-union *fora*, without first exhausting internal remedies. Thus, complained Holder, with the Board's subsequent agreement, Respondents interfered with his "right to sue" by enforcing as to him the rule requiring members of Respondents to exhaust internal remedies prior to seeking extra-union relief.

The "overall plan" of this nation's labor legislation shows that in the Act Congress did not intend to interfere with a union's right to discipline its members for any reason, so long as that union did not attempt to condition a member's *employment* on good standing membership (see §8(b)(2) of the Act). It was in 1959—again following the "overall plan" of the Congress—that the Congress turned to the question of the rights of union members to be free, *as members*, from certain types of union conduct. Particularly relevant to this case is §101(a)(4) of the Landrum-Griffin Act, which protects for union members, *qua* members, the "right . . . to institute an action in any court, *or in a proceeding before any administrative agency* . . ." It is perfectly plain that in the instant case, Holder's unfair labor practice charge alleged no more than interference by Respondents with his "right to sue"—a right made federally cognizable by §101(a)(4) of the Landrum-Griffin Act.

Section 101(a)(4) of the Landrum-Griffin Act is found in Title I of that act. Title I also contains a §102 which states that cases in which union members complain of violations of Title I "*shall* be brought in the district court of the United States for the district where the alleged violation occurred."[6]

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[6] Section 103 of the Landrum-Griffin Act, which is also found in Title I, states that nothing in the preceding portion of Title I shall "limit the rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal . . .". By this provision Congress was obviously not preserving for union members any right, founded on Section 8(b)(1)(A)

This §102 means, of course, that a forum has been established by Congress as the proper one in which union members may complain, as did Holder, that their union has abridged "their right . . . to institute an action . . . in a proceeding before any administrative agency . . .". That forum is simply not the Board. And the proviso to §8(b)(1)(A) of the Act is evidence enough that Congress did not intend to have the Board concern itself with purely intra-union matters. Thus, the "overall plan"[7] of the Congress, to which alone the Board would invite the attention of this Court, destroys the Board's theory of a violation of §8(b)(1)(A) in this case just as certainly as the specific legislative history of that section cited herein and largely relied upon by this Court last term in its *Allis-Chalmers* opinion.

Once again, all we have said in this section of our Argument has been apprehended by this Court in the *Allis-Chalmers* opinion. As to the "overall plan" of federal labor legislation and the relationship between the Taft-Hartley and Landrum-Griffin Acts, Justice Brennan spoke as follows at pages 193-194 of his opinion:

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of the Act, to be free of discipline by his union for violating a union rule requiring exhaustion of remedies, where that discipline was not coupled with interference with the member's status as an employee. This is obvious because it was not until the **Skura** decision, which was handed down in **1964**, that anyone supposed that Section 8(b)(1)(A) could cover such a situation, and certainly Congress in 1959 was not, in Section 103 of the Landrum-Griffin Act, preserving for members "rights" which did not exist until 1964.

[7] A case exemplifying this "overall plan" is **McCraw v. United Association**, 341 F. 2d 705 (6th Cir., 1965). Although the Court decided many issues in that case which are not relevant to this appeal, what is significant is that the action was brought by a union member to complain that his rights under Section 101(a)(4) of the Landrum-Griffin Act were violated by a union fine imposed upon him for filing charges with the Board without exhausting intra-union remedies. The Court found a violation of Section 101(a)(4). What is interesting about this case is that it serves to illustrate that a district court in an action brought under Title I of the Landrum-Griffin Act is the proper forum to which to bring complaints against a union of the nature Holder brought in the instant case.

"The 1959 Landrum-Griffin amendments, thought to be the first comprehensive regulation by Congress of the conduct of internal union affairs, also negate the reach given Section 8(b)(1)(A) by the majority *en banc* below. 'To be sure, what Congress did in 1959 does not establish what it meant in 1947. However, as another major step in an evolving pattern of regulation of union conduct, the 1959 Act is a relevant consideration. The Court may properly take into account the latter Act when asked to extend the reach of the earlier Act's vague language to the limits which, read literally, the words might pemit.' *Labor Board v. Drivers' Local Union*, 362 U. S. 274, 291-292. In 1959 Congress did seek to protect union members in their relationship to the union by adopting measures to insure the provision of democratic processes in the conduct of union members subjected to discipline."

The *Drivers' Local Union* case, cited by the Court in the above quotation, is noteworthy because it was the last previous effort by the Board, prior to its *Skura* line of cases, to find in the general language of Section 8(b)(1)(A) unfair labor practices not set forth in the subsequent subsections of Section 8(b) and not covered by the language of Section 8(b)(1)(A). Prior to correction by this Court in *Drivers' Local Union*, the Board had held in numerous cases that so-called "recognitional picketing" by a union violates Section 8(b)(1)(A). But this Court reversed the Board and one of the grounds for this reversal was that Congress's enactment (by the Landrum-Griffin Act) of Section 8(b)(7), which particularly addressed itself to the problem of recognitional picketing, evidenced a Congressional intention not to proscribe such picketing by the general language of Section 8(b)(1)(A). The analogy here is perfect, just as it was in *Allis-Chalmers*. Had Congress believed that Section

8(b)(1)(A) prohibited what the Respondents did to Holder, in this case, there would have been no reason to enact Section 101(a)(4) of the Landrum-Griffin Act. Accordingly, under the reasoning of this Court in *Drivers' Local Union*, as applied by this Court in *Allis-Chalmers*, and as all of this correctly and authoritatively apprehends the "overall plan" of the Congress, it cannot be held that Section 8(b)(1)(A) governs the Respondents' conduct at issue here and makes that conduct an unfair labor practice. Accordingly, the decision of the court below should be affirmed.

IV.

CASE AUTHORITY SUPPORTS THE DECISION OF THE COURT BELOW.

The most authoritative court pronouncement on the issues raised in this proceeding is this Court's *Allis-Chalmers* gloss on Section 8(b)(1)(A). The particularly significant aspect of *Allis-Chalmers*, vis-a-vis the instant case, is that the union conduct there at issue came much closer to a Section 8(b)(1)(A) violation than Respondents' conduct in this case. It will be recalled that *Allis-Chalmers* involved union fines against members, and attempted court enforcement thereof, for crossing and working behind picket lines during an economic strike. Obviously, by choosing not to respect picket lines, the disciplined members in the *Allis-Chalmers* case were choosing to refrain from concerted activity. Refraining from concerted activity is conduct *expressly protected* by section 7 of the Act. In this case, however, Holder engaged in nothing that could be called "protected activity" within the meaning of Section 7. Accordingly, on its facts, this case is much more compelling for a conclusion of non-violation of Section 8(b)(1)(A) than was *Allis-Chalmers*.

The three opinions in *Allis-Chalmers* also indicate that all nine justices of this Court must, if they choose to follow their reasoning in that case, find the Respondents innocent and affirm the Court below in this case.

The majority opinion in *Allis-Chalmers* holds that a union's imposition of a fine upon its members without affecting their status as employees is simply not the type of "restraint or coercion" that Section 8(b)(1)(A) intended to reach and therefore ". . . the fines themselves and *expulsion for non-payment would not be* an unfair labor practice." (*Allis-Chalmers*, p. 192.)

Moreover, the dissenting justices in *Allis-Chalmers* also clearly indicated in their opinion, written by Justice Black, that mere expulsion of a member cannot constitute in any case a violation of Section 8(b)(1)(A). Justice Black's difference with the majority in *Allis-Chalmers* clearly proceeds on the premise that the union in that case went beyond the area of privileged internal affairs by seeking "effective outside assistance to enforce the payment of its fines" (p. 206). The following remark of Justice Black, however, indicates that which is made manifest in his opinion, namely, that a union is not guilty of restraint or coercion prohibited by Section 8(b)(1)(A) when, without seeking extra-union help, it disciplines a member:

> "Just because a union might be free, under the proviso, to expel a member for crossing a picket line does not mean that Congress left unions free to threaten their members with fines" (page 203).

From the foregoing, it would appear that eight justices in the *Allis-Chalmers* case would find the Respondents innocent of prohibited restraint or coercion in this case.[8]

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[8] At page 16 of its brief the Board explains its theory of "restraint or coercion" by stating that mere expulsion would have such effect, "since it entails the loss of union strike funds, pension and insurance benefits". Here, the Board again reaches beyond the record for

And, as we have seen at page 16 above, Justice White's concurring opinion in *Allis-Chalmers* also contains reasoning which would require that the court below be sustained in the instant case. That opinion appears to assume that the expulsion of a member by a union might limit the member's Section 7 rights. But, Justice White concludes, "Such restraint and coercion Congress permitted by adding the proviso to Section 8(b)(1)(A)." (*Allis-Chalmers*, p. 198.)

Of course, this Court's decision in *Allis-Chalmers* is not the only case in which Section 8(b)(1)(A) was interpreted as this Court did in that case. Just the other day, the Court of Appeals for the Seventh Circuit decided *Scofield v. NLRB*, 57 Labor Cases ¶12,531, 1968. In this decision, which affirmed the Board's decision in *Wisconsin Motors Corp.*, 145 NLRB 1097 (1964), the Court concluded that ". . . internal union disciplines are not among the proscribed restraints" intended to be reached by Section 8(b)(1)(A). In *Scofield*, Chief Judge Cummings cites many other court decisions also reaching this correct conclusion.

Confronted by this case authority, the Board is compelled to rely almost solely on its own recent *Skura* line of cases (and on approval of their reasoning by the Court of Appeals for the District of Columbia in *Roberts v. NLRB*, 353 F. 2d 427, 1965), as authority for its position in this case. These decisions, of course, suffer from all of the defects discussed above. Moreover, so defective is the Board's reasoning in *Skura* that the Solicitor General does not attempt to defend this case on that reasoning. The basis of the decision that an unfair labor practice had been committed in the *Skura*

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some support for its case. The record simply does not contain any evidence that Holder suffered any such losses by reason of his expulsion. In addition, the record indicates to the contrary that, in point of fact, Holder suffered no restraint or coercion, since he regarded union membership so lightly as to feel free to ignore the constitutional provisions requiring all members to exhaust intra-union remedies prior to seeking court or administrative relief.

case was that Section 10 of the Act gave the Board an "implied power" to keep access to the Board open—an implied power which could be enforced by means of finding a union guilty of an unfair labor practice under Section 8(b)(1)(A). This bizarre reading of the Act—which entails the finding of unfair labor practices in places other than Section 8—is completely abandoned by the Solicitor General in his brief. As we have seen, the Board seeks to have this Court find that Respondents had committed an unfair labor practice largely on the basis of its interpretation of Section 8(b)(1)(A). But the Board decision in this case was based solely on the reasoning contained in *Skura*, as further developed by the Board in *Van Camp Sea Food Co., Inc.*, 159 NLRB No. 47 (1967) (R. 24). This Court will, of course, judge the propriety of the Board's decision in this case solely on the basis of the reasoning offered by the Board for that decision and not on the basis of a different reason offered for the first time in this Court. This is because, as this Court said in *S. E. C. v. Cherney Corp., et al.*, 332 U. S. 194, at p. 196, it is a "fundamental rule of administrative law" that

> ". . . the reviewing court in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by such agency. If those grounds are inadequate or improper, the Court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis."

In *NLRB v. Metropolitan Life Insurance Co.*, 380 U. S. 438 (1965), Justice Goldberg stated for this Court that,

> ". . . [T]he integrity of the administrative process requires that 'courts may not accept appellate counsel's *post hoc* rationalization for agency action' . . . [since]

> . . . for reviewing courts to substitute counsel's rationale or their discretion for that of the Board is incompatible with the ordinary function of the process of judicial review".

We believe, despite the seeming effect of the foregoing authorities, that it is unnecessary for this Court to remand this case to the Board for the purpose of reexamining the theoretical basis of the *Skura* rule. This is because there is simply no reasoning by which the rule of that case can be sustained. We cite present counsel's refusal to defend *Skura* on the Board's own terms as further evidence of the frailty of that decision.

Perhaps the greatest error which the Board's *Skura* decision manifests is one to which we have not yet adverted. That error—perhaps we should say evil—is that in *Skura,* and in subsequent cases, the Board has attempted to arrogate to itself the power to decide which items of a union's conduct as to its purely internal affairs are "legitimate" and which are not. Thus, the Board has decided that it is all right for a union to discipline a member for crossing a picket line (*Allis-Chalmers*), or for filing a decertification petition *(Price v. NLRB,* 373 F. 2d 443, 9th Cir., 1967, pending on petition for certiorari, No. 339, this term). See also *Tawas Products,* 151 NLRB 46 (1965). But the Board has also decided that it is somehow not proper, and against public policy, for a union to enforce against a member a rule requiring exhaustion of internal remedies. What is the source of this power? It certainly is not specified anywhere in the Act. To the contrary, the proviso to Section 8(b)(1)(A) puts beyond the ken of Board concern the purely internal affairs of labor unions. And yet, in a whole line of cases the Board is now attempting to determine for unions what internal rules as to membership terms they may and may not make. The Board clearly has no statutory power to do this.

The brief submitted by the Board to this Court well illustrates the Board's attempt by means of the *Skura* line of cases to usurp for itself the power to adjudge the legality of intra-union rules. At page 18 of the Board's brief we find this caption: "B. Union discipline for filing charges with the Board without first exhausting internal union procedures is not privileged as an internal union matter beyond the scope of Section 8(b)(1)(A)". But in the portion of the brief following that caption (pp. 18-27), the Board not once explains why a rule requiring the exhaustion of internal union remedies is not "an internal union matter beyond the scope of Section 8(b)(1)(A)". To the contrary, the Board devotes all of this portion of its brief to emphasizing that such a union rule is "beyond the area of *legitimate* internal union affairs" (brief, p. 20). But because the Board deems this rule requiring exhaustion to be "illegitimate", it does not follow that such rule is other than an internal union rule. And, in any event, as we have seen, the Board has no statutory power to decide which internal union rule is legitimate and which is not. Accordingly, it is submitted that *Skura* and the other cases following its rule should not be looked to by this Court as a reasoned and proper interpretation of Section 8(b)(1)(A) of the Act.

One case relied upon by the Board is this Court's decision in *Nash v. Florida Industrial Commission*, 389 U. S. 235 (1967). But the *Nash* case obviously has nothing to do with Section 8(b)(1)(A) of the Act. In *Nash*, this Court decided that refusal by a *state* to pay unemployment insurance to workmen solely because they have filed charges with the Board constitutes state action violative of the supremacy clause of the United States Constitution. Assuredly, however, the Board has no power to enforce the supremacy clause. Assuming the existence of a federal policy to preserve free access to the Board, it certainly does not follow that a union's interference with that free

access constitutes an unfair labor practice.[9] When it is remembered that the sole issue in this case is whether Respondents committed the unfair labor practice defined in Section 8(b)(1)(A), it becomes more than obvious that this Court's *Nash* decision lends no support to the Board's position in this case.[10]

V.

SECTION 101(a)(4) OF THE LANDRUM-GRIFFIN ACT REQUIRES THAT THE DECISION OF THE COURT BELOW BE AFFIRMED.

Section 101(a)(4) of the Landrum-Griffin Act provides that,

> "No labor organization shall limit the right of any member thereof to institute an action in any Court, or . . . before any administrative agency . . . *Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organization . . ."

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[9] Of course, what the Respondents did here did not deny to Holder free access to the Board. To the extent that Respondents' rule requiring exhaustion of internal remedies affected Holder's access to the Board's processes, it did not **prevent** him from using those processes, or penalize him from doing so, but merely delayed the date at which he could invoke them.

[10] At footnote 12 of its brief (page 15), the Board cites four additional cases which, it is contended, support the construction that the Board would have this Court give to Section 8(b)(1)(A). But those cases are transparently distinguishable on their facts from the instant case. Each involved interference with activity clearly protected by Section 7 by means of threats of physical violence as well as, in three of the cases, threats of loss of employment. What we have said in the preceding portions of this brief obviates the need for further explanation of why these authorities do not aid the Board in this case.

The Court below held that the effect of that Section is to make "it mandatory that the *Skura* rule be rejected and the Board's action in this case be set aside" (R. 39). As we shall now show, this conclusion of the court was correct. Obviously, it would make no sense to hold that conduct expressly sanctioned by Section 101(a)(4) of the Landrum-Griffin Act constitutes an unfair labor practice. However, it is submitted that this reasoning is not necessary to a rejection of the *Skura* rule by this Court and a consequent affirmance of the Court of Appeals' decision. Put differently, even should this Court hold that the court below was incorrect in its interpretation of Section 101(a)(4) it still would not follow that the Respondents' conduct in this case, even though not authorized or sanctioned by Section 101(a)(4) of the Landrum-Griffin Act, constitutes an unfair labor practice under Section 8(b)(1)(A) of the Taft-Hartley Act. We shall, nevertheless, show that the court below was correct in deciding that Respondents' conduct was lawful under the proviso to Section 101(a)(4) of the Landrum-Griffin Act.

The proviso to Section 101(a)(4) states that any member, "may be required" for a four month period of time to exhaust intra-union remedies prior to seeking extra-union relief. The Board argues here that it is not a union but only a court which may enforce a union rule requiring exhaustion of intra-union remedies. This interpretation of the proviso to Section 101(a)(4) is clearly unwarranted. We cannot improve on the explanation by the Court below of why it must be held that, under the proviso, it is a union and not a court which is authorized to require exhaustion of internal remedies. The lower court said in this regard:

> "To avoid the impact of this proviso, the Board argues that the proviso does not say who may require the union member to exhaust internal hearing procedures

and then reaches the surprising conclusion that it is the Board, rather than any labor organization, that is authorized by Congress to require that a union member resort to reasonable intra-union procedures. We think this construction does violence to the structure and the sense of section 101. That section is entitled, 'Bill of rights; constitution and by-laws of labor organizations'. It consists of a number of provisions prescribing what unions may and may not do and require in the conduct of their affairs and in the treatment of their members. The general prohibition in the subsection here in question is expressly directed against labor organizations. Logically, and in normal reading, the attendant and qualifying proviso is an exception stating what such an organization may do despite the preceding general restriction upon its action. Moreover, there is no need for a proviso to authorize a court or an administrative body to postpone its action until a litigant shall exhaust intra-union remedies, since judicial and quasi-judicial bodies frequently exercise such discretionary power to postpone their own action pending the exhaustion of other remedies as a matter of inherent right without benefit of legislation" (R. 39-40).

The Board does not even attempt to rebut the foregoing. Rather, it engages in an examination of the legislative history of Section 101(a)(4) and attempts to extrapolate from that history some support in the debates and reports for the conclusion that it is courts and not unions which may require members to exhaust internal remedies under the proviso of Section 101(a)(4). It is clear, however, contrary to the Board's discussion of the legislative history of Section 101(a)(4), that the only items of that history which directly relate to the point of whether courts or unions may require members to exhaust internal remedies under the

proviso support the construction given to the proviso by the court below, namely, that it is unions which are authorized to require members to exhaust intra-union remedies. Senator Goldwater, in his remarks concerning the Kennedy-Irvin Bill (S. 1555), which passed the Senate on April 25, 1959, made the following statement concerning the "Protection of the Right to Sue" provision found in that bill—a bill which, aside from specifying a six-month period "during which members may be required to exhaust reasonable hearing procedures", differed in no substantial respect from what ultimately became Section 101(a)(4) of the Landrum-Griffin Act:

> "The draftsmanship of this provision is an open invitation *to unions* to discipline and penalize their members for using the processes of the NLRB against unions which have committed unfair labor practices against any of their members" (emphasis supplied; 105 Congressional Record 9108, *Legislative History, LMRDA*, 1959, p. 1280).

The only other item of legislative history which, to our knowledge, is directly on point in this regard also supports the conclusion of the court below rather than the conclusion the Board would have this Court reach. Interestingly, this item of legislative history is found at p. 36 of the Board's brief and is weighty indeed, since it is from the statement of Senator John F. Kennedy in which he reported back to the Senate the results of the work of the conference committee that fashioned the compromise that became Title I of the Landrum-Griffin Act. Senator Kennedy said,

> "On the other hand, it was not, and is not, the purpose of the law to eliminate existing grievance procedures established by union constitutions for redress of alleged violation of their internal governing laws."

(105 Congressional Record 16414, *Legislative History, LMRDA*, 1959, p. 1432.)

In the course of these same remarks, Senator Kennedy then spoke directly to the point at issue:

> "The four-month limitation in the House Bill also related to restrictions imposed by unions rather than the rules of judicial administration or the action of Government agencies." (105 Congressional Record 16414, *Legislative History, LMRDA*, 1959, p. 1432.)

The Board dismisses these last remarks by first calling them "cryptic" and then engaging in some speculation as to what Senator Kennedy "might" have meant by them (Board's brief, p. 36, f.n. 34). There appears to us simply no reason for not believing that Senator Kennedy meant exactly what he said and that, under the proviso of Section 101(a)(4), *unions* are authorized to require members to exhaust intra-union remedies.

Aside from the remarks of Senators Goldwater and Kennedy to which we have adverted, we must concede that there is a dearth of legislative history on this precise question. However, as the Board's brief well demonstrates, it is plain that the Congress wished not to disturb the doctrine of exhaustion of internal remedies as that doctrine had developed in the state and federal courts.[11] But in its brief the Board first states the legislative history establishing this Congressional purpose and then attempts to explain it away by contending that the doctrine of exhaustion of internal remedies, as it has developed in the courts, is no more than a rule of judicial discretion to be applied by the judiciary on a case by case basis. But this simply is not so. Indeed, the prime rationale normally given by courts for the ex-

[11] For the items of legislative history supporting this conclusion, see pp. 32, 35-37 of the Board's brief.

haustion of remedies doctrine is that the constitution and by-laws of a union constitute a binding contract between the union and each member and that, therefore, the union has a *contract right* to require exhaustion of internal remedies by members as a precondition to their obtaining extra-union judicial relief. *Snay v. Lovely,* 276 Mass. 159, 176 N. E. 791 (1931); *Polen v. Kaplan,* 257 N. Y. 277, 177 N. E. 833 (1931); *Bush v. International Alliance,* 55 Cal. App. 2d 357, 130 Pac. 2d 788; *Williams v. Masters, Mates & Pilots,* 384 Pa. 413, 120 A. 2d 896 (1956). See also, *Dragwa v. Federal Labor Union,* 136 N. J. Eq. 172, 41 A. 2d 32 (1945). And, of course, if a union has a contract right to require exhaustion of internal remedies, it certainly may not be held that judicial protection of that right is a mere rule of judicial administration.

It is also significant that fulfillment of the requirement of exhaustion of internal remedies is deemed by many authorities as so basic as to constitute a precondition to a court's having subject matter jurisdiction. *Falsetti v. Mine Workers,* 400 Pa. 145 (1960); *Wax v. Mailers' Union,* 400 Pa. 173 (1960); *Knox v. UAW, Local 90,* 361 Mich. 257, 104 N. W. 2d 743 (1960); *Kopke v. Ranney,* 16 Wis. 2d 369, 114 N. W. 2d 485 (1962); see also 87 ALR 2d 1082, at 1107-1108. Here, again, the holding in the foregoing cases makes unsupportable the theory that the doctrine of exhaustion of intra-union remedies is merely a rule of judicial discretion.

From all of the foregoing, it must be concluded (although we believe that the Court need not decide this issue in this case) that, under the proviso to Section 101(a)(4) of the Landrum-Griffin Act, it is a union, and not a court, that may require a member to exhaust internal union remedies and that, therefore, it may not be held that Respondents were guilty of an unfair labor practice for engaging in conduct sanctioned by the Landrum-Griffin Act.

CONCLUSION.

For all of the foregoing reasons, Respondents respectfully submit that the judgment of the court below should be affirmed.

Respectfully submitted,

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